

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 55822-6-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
SCOTT ALAN FREEBURG,)	Unpublished Opinion
)	
Appellant.)	FILED: August 14, 2006
)	

PER CURIAM. Scott Freeburg asks this court to vacate his sentence and remand his case for a new sentencing proceeding because the State failed to prove that his prior convictions were comparable to Washington offenses. But Freeburg relieved the State of its burden to prove the comparability of his federal convictions when defense counsel agreed that the court's calculation of Freeburg's standard range was correct.

FACTS

Early on the morning of November 17, 1994, Freeburg entered an apartment shared by Darlene Martinez and Jose Rodriguez, and he shot and killed Rodriguez. Freeburg's friend, Lawrence Kuhn, fired at Martinez as she ran out of the apartment,

but he missed her.

In February 1999, Freeburg was convicted in King County Superior Court of first degree murder, first degree burglary, and second degree assault, all with a firearm. At Freeburg's sentencing hearing, the State presented proof of his previous convictions, including a 1976 robbery in King County, a 1980 federal bank robbery conviction, two federal escape convictions, and a federal assault with intent to commit murder. A fingerprint expert testified that the Scott Freeburg in the courtroom was the same Scott Freeburg whose fingerprints were on documents establishing the defendant's previous convictions.

Defense counsel objected that the evidence to establish Freeburg's prior convictions contained hearsay and therefore would not stipulate to their admission. Defense counsel also expressed concern about what could "be considered in determining comparability." Defense counsel objected to the admission of the information and certification of probable cause. The court admitted the evidence over defense counsel's objections.

The court found that Freeburg was guilty of the King County robbery, the federal bank robbery, assault with intent to commit murder, and one escape charge.¹ Moreover, Freeburg's Washington robbery conviction and his federal bank robbery conviction were comparable to most serious offenses in Washington under the Persistent Offender Accountability Act (POAA). Therefore, the court found Freeburg

¹ One of Freeburg's escape convictions was overturned on appeal.

to be a persistent offender and sentenced him to life in prison.

Freeburg appealed. This court reversed his convictions based upon the improper admission of evidence and remanded his case for retrial. Freeburg was retried in March 2002 and was convicted again on all three counts.

In May 2002, at Freeburg's second sentencing hearing, the prosecutor argued again that Freeburg was a persistent offender based upon his King County robbery and federal bank robbery convictions, which were comparable to serious offenses in Washington under the POAA. Defense counsel objected to the State's allegation that Freeburg was a persistent offender and to Freeburg's criminal history, as presented in a Department of Corrections (DOC) report. The court struck a section of the DOC report, but left intact the summary of Freeburg's prior criminal history. The court found Freeburg to be a persistent offender and sentenced him to life in prison.

Freeburg appealed again. This court affirmed his convictions, but remanded his case for re-sentencing, deciding that the trial court erred when it concluded that Freeburg's federal bank robbery conviction was comparable to a second degree robbery conviction in Washington. See State v. Freeburg, 120 Wn. App. 192, 84 P.3d 292 (2004).

Freeburg was sentenced a third time on February 17, 2005. He was represented at that hearing by a lawyer who had not represented him before. Defense counsel asked for more time to research and brief two potential sentencing

issues: (1) whether the federal bank robbery conviction counted as a previous conviction, as the State asserted; and (2) whether Freeburg's first degree burglary conviction merged with his first degree murder conviction. The trial court denied counsel's request for more time: "I am going to go forward with sentencing, Mr. Hall. I don't mean in any way to cut you short shrift on this thing. But I believe this has been thoroughly reviewed—thoroughly reviewed; I will leave it at that." Verbatim Report of Proceedings (VRP) (Feb. 17, 2005) at 22.

The court did not include Freeburg's federal bank robbery conviction in calculating his offender score. But the court held that Freeburg's murder and burglary convictions did not merge and, therefore, the court counted both the burglary (two counts) and the assault of a different victim (two counts) as other current offenses. Three prior convictions were included in the calculation of Freeburg's offender score: the 1976 King County robbery (two counts); the 1985 federal assault with intent to commit murder (two counts); and the 1980 federal escape (one count). Freeburg's offender score, therefore, was nine.

The State recommended sentencing Freeburg to a term of 608 months, the top of a standard range sentence for first degree murder when the offender score is nine, plus 60 months for deadly weapons enhancements.

As defense counsel began making his recommendation, the court interrupted him and asked if he agreed that Freeburg's new range would be 471 to 608 months:

THE COURT: You—well, let me stop you there. Do you agree with this count; that the new range would be 471 to 608—

MR. HALL: Well—

THE COURT: —enhancements?^[2]

MR. HALL: I agree that the enhancements apply and that, and the number of months that were indicated; however, I think that the enhancements go to the particular crimes that the convictions pertain to. So, in other words, there's the 24-month enhancement that applies to the murder and the burglary in the first degree charge, and the 12-month enhancement that applies to the assault charge. And that does add up to 60 months, if you total that up.

THE COURT: To 608.

MR. HALL: Yes.

THE COURT: There's no, no dispute on the count. Okay. All right. Go ahead.

VRP (Feb. 17, 2005) at 21–22. The court then sentenced Freeburg to the low end of the standard range, a term of 471 months. He appeals.

ANALYSIS

Freeburg argues that the sentencing court erred when it included two federal convictions in the calculation of his offender score without proof of their comparability. Freeburg, however, affirmatively acknowledged that his federal convictions were properly included in his offender score calculation, relieving the State of its burden to prove the comparability of the convictions.

Washington's Sentencing Reform Act (SRA) creates a grid of standard sentence ranges based upon the defendant's offender score and the seriousness level of the current offense. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). An offender score is the sum of points accrued under RCW 9.94A.525,

² The transcript seems to indicate that part of the exchange between the court and defense counsel is missing.

which includes points for prior convictions and points for other current offenses. “A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed.” RCW 9.94A.525(1).

“Other current offenses” are “[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed[.]” RCW 9.94A.525(1).

When a defendant's criminal history includes federal or out-of-state convictions, those convictions must

be classified according to the comparable offense definitions and sentences provided by Washington law. . . . If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). The court must compare the elements of the foreign offense with the elements of potentially comparable Washington crimes. State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004).

If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.

Ford, 137 Wn.2d at 479.

Although the State generally has the burden to prove the defendant's alleged criminal history and the comparability of the defendant's out-of-state and federal convictions, a defendant's affirmative acknowledgment that foreign convictions are

properly included in his offender score satisfies the statutory requirement. Ross, 152 Wn.2d at 230. A defendant, however, does not acknowledge that foreign convictions are properly included in the offender score merely by failing to object. Ford, 137 Wn.2d at 483. If the State does not offer evidence to support its burden, the defendant has no burden to object. See Ford, 137 Wn.2d at 481. “Acknowledgment does not encompass bare assertions by the State unsupported by the evidence.” Ford, 137 Wn.2d at 483.

Freeburg's case is not one in which defense counsel merely failed to object to the State's bare assertions about a defendant's criminal history. Rather, his situation is similar to the case of Russell Hunter.³ In Hunter's case, the State initially included five out-of-state convictions in the calculation of his offender score. Hunter challenged whether two of his out-of-state convictions were comparable to Washington offenses. The State conceded it could not prove that one of the convictions was comparable and, therefore, recommended that the sentencing court calculate Hunter's offender score as 4. In response, defense counsel conceded that one of the challenged convictions was properly included in the calculation of Hunter's offender score.

On appeal, Hunter argued that the sentencing court miscalculated his offender score because the court included prior out-of-state convictions that the State had not proved were comparable to Washington felonies. The Court of Appeals held that the

³ Hunter is one of the appellants in the case reported as State v. Ross, 152 Wn.2d 220.

sentencing court correctly calculated Hunter's offender score because his counsel affirmatively acknowledged that his prior out-of-state convictions were properly included.

The Supreme Court affirmed. The court held that although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state or federal convictions, a defendant's affirmative acknowledgment that his prior out-of-state or federal convictions are properly included in his offender score satisfies SRA requirements: "[S]ince Hunter affirmatively acknowledged at sentencing that his prior out-of-state convictions were properly included in his offender score, we hold the sentencing court did not violate the SRA nor deny him due process." Ross, 152 Wn.2d at 233.

Freeburg likewise affirmatively acknowledged that his federal convictions were properly included in his offender score.⁴ The court had explained that it calculated Freeburg's offender score to be nine, based in part upon Freeburg's federal assault with intent to commit murder and escape convictions, and his standard range was 471 to 608 months. In response to the court's direct inquiry, defense counsel acknowledged that Freeburg's standard range, which was based upon an offender score of nine, had been correctly calculated. Defense counsel agreed that

⁴ Freeburg argues that the Supreme Court's decision in Ross was incorrectly decided, considering the Supreme Court's decisions in Blakely v. Washington, 542 U.S. 209, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This court, however, is obligated to follow Ross.

Freeburg's standard range was 471 to 608 months with the enhancements included.

Moreover, although the State did not put on evidence at Freeburg's third sentencing hearing to prove his federal convictions, there was evidence in the record to support those convictions. When Freeburg was sentenced the first time, the State submitted certified copies of judgments and other evidence to prove the existence and comparability of the convictions. The court also included those convictions in Freeburg's criminal history when it sentenced him for the second time. Freeburg successfully appealed that sentence by challenging the comparability of his bank robbery conviction. The issue of comparability, therefore, was prominent in this case.

Furthermore, although Freeburg's new attorney asked the court for additional time to brief two issues, neither potential issue related to the comparability of Freeburg's federal convictions. Under these circumstances, by agreeing with the court's calculation of Freeburg's offender score, defense counsel relieved the State of its burden to prove the comparability of Freeburg's federal convictions.

Freeburg contends that the trial court abused its discretion because it denied defense counsel's request for more time to research and brief the potential sentencing issues. Freeburg claims that his attorney had no opportunity to review the file or prepare for the sentencing hearing except to review this court's decision and gather information from Freeburg. Freeburg argues that the trial court essentially deprived him of his right to effective assistance of counsel at the

sentencing hearing.

But defense counsel did not express a need for more time to become familiar with the file. Rather, counsel asked for more time to research two particular issues. The first was whether the court could count Freeburg's federal bank robbery conviction in calculating his offender score. The judge expressed his belief that this court's decision in Freeburg's second appeal prohibited him from counting it.

The second issue that Freeburg's counsel wanted more time to research was whether the murder and burglary charges merged. Having tried the case twice, the court did not hesitate to reject defense counsel's merger argument without additional research.

A court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Under these circumstances, denying defense counsel's request for more time was not unreasonable.

Freeburg suggests that defense counsel would have successfully challenged the court's inclusion of his federal convictions in the calculation of his offender score if defense counsel had had more time. But Freeburg does not actually argue that his federal convictions are not comparable to Washington crimes. He merely contends that the State failed to prove they are comparable. But Freeburg affirmatively acknowledged that his federal convictions were properly included in his offender score. He, therefore, waived his right to have the State prove their

comparability to Washington crimes.

Sentence Enhancements

Freeburg argues that the sentencing court improperly imposed deadly weapons enhancements. The court ordered sentence enhancements for all three of Freeburg's current offenses for a total of an additional 60 months. The State concedes that under the relevant statute, former RCW 9.94A.310(3) (1994), sentence enhancements could be imposed only for the burglary and assault convictions, and the enhancements were required to be imposed concurrently, not consecutively. Additionally, the length of a deadly weapons enhancement for burglary was 18 months. We, therefore, reverse the deadly weapons enhancements and remand for re-sentencing on the enhancements only.

Freeburg's Additional Grounds for Review

In addition to the issues raised by Freeburg's counsel on appeal, Freeburg makes two additional arguments in his Statement of Additional Grounds for Review. First, Freeburg contends that the sentence enhancements are invalid because they impact his ability to earn "good time" credits. Second, he contends that the clerk of the court committed error by requiring him to pay court costs that were not imposed by the judge. These issues involve matters outside the record and, therefore, neither is appropriately addressed by this court on appeal.

Conclusion

Freeburg relieved the State of its burden to prove the comparability of his

federal convictions when defense counsel agreed with the court's calculation of his offender score and standard sentence range. But the court improperly imposed deadly weapons enhancements totaling 60 months. Because the enhancements ordered were not consistent with the relevant statute, we reverse and remand for re-sentencing on the deadly weapons enhancements only. In all other respects, we affirm.

FOR THE COURT:

Columen, J.

Appelwick, C.J.

Grosse, J.